NG YAU THAI

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
GEORGE SEAH SCJ
HASHIM YEOP SANI SCJ
WAN HAMZAH SCJ
[CRIMINAL REFERENCE NO. 1 OF 1986]
7 FEBRUARY 1987

CRIMINAL LAW AND PROCEDURE: *Reference to the Supreme Court on question of law of public interest - Courts of Judicature Act 1964 - Section 66 - Evidence Act 1950 - Sections 114(b) and 133 - Corroboration in relation to accomplice's evidence.*

The following question of law of public interest was referred under s. 66 of the Courts of Judicature Act 1964 to the Supreme Court.

> Whether or not the High Court was right in ruling owing to the strenuous submission made by defence Counsel at the Magistrate's Court on the question of the danger of accepting the uncorroborated testimony of an accomplice, the Court must have had the risk in its mind before accepting the uncorroborated testimony of the accomplice without requiring some indication in the judgment itself that the Magistrate had this rule of caution in mind.

Held:

[1] The High Court was wrong in law to hold that the warning need not appear in the judgment or grounds of decision of the trial Magistrate.

[2] The warning as to the danger of convicting on uncorroborated evidence if the prosecution is relying on the testimony of an accomplice does not involve some legalistic ritual to be automatically recited by the trial Magistrate, or that some particular form of words or incantation has to be used and if not used, the judgment is deemed to be faulty and the conviction set aside. There is no magic formula and no set words which must be adopted to express the warning. Rather must the good sense of the matter be expounded with clarity and in the setting of a particular case.

[Appeal dismissed. Conviction affirmed.]

Cases referred to:
Bereng Griffith Lerotholi & Ors. v. The King [1950] AC 11
Chiu Nang Hong v. PP [1965] 31 MLJ 40
R v. Spencer [1986] 2 All ER 928

Legislation referred to:
Courts of Judicature Act 1964, s. 66
Evidence Act 1950, ss. 133, 144(b)

Other sources referred to:
Sarkar's Law of Evidence

For the applicant - Karpal Singh of M/s. Karpal Singh & Co.
For the public prosecutor - Tan Hock Chuan, DPP

JUDGMENT

George Seah SCJ:

This is a reference under s. 66 of the Courts of Judicature Act 1964 and the certified question of law of public interest reads:

> Whether or not the High Court was right in ruling owing to the strenuous submission made by defence Counsel at the Magistrate's Court on the question of the danger of accepting the un-corroborated testimony of an accomplice, the Court must have had the risk in its mind before accepting the uncorroborated testimony of the accomplice without requiring some indication in the judgment itself that the Magistrate had this rule of caution in mind.

The law in Malaysia which deals with the evidence of an accomplice who gives testimony for the prosecution is contained in s. 133 and s. 114 illustration (b) of the Evidence Act 1950. For the purpose of this reference we do not find it necessary to discuss the combined effect of these two sections and illustration (b), except to answer the certified question placed before this Court.

In *Bereng Griffith Lerotholi & Ors. v. The King* [1950] AC 11 the appellants were found guilty of an sentenced to death for the murder (alleged to be a ritual murder) on 4 March 1948 of one Meleke Ntai, a brother or cousin of one of the appellants, who was alleged to have sold Meleke Ntai for £100 as "medicine". Lord Reid in delivering the judgment of the Privy Council said at p. 13-14:

> The law in Basutoland with regard to accomplice evidence enacted in s. 231 of the Basutoland Criminal Procedure and Evidence Proclamation 1938; that section was amended by the Basutoland Criminal Procedure and Evidence (Amendment) Proclamation 1944 and the amended section is as follows:
>
> > 'Any Court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment or summons on the single evidence of any accomplice:
> >
> > Provided that the offence has, by competent evidence, other than the single and unconfirmed evidence of the accomplice, has proved to the satisfaction of such Court to have been actually committed.'

At p. 21 Lord Reid continued:

> It is not disputed, and there is no doubt, that a Judge in Basutoland, as elsewhere, must always have in mind the danger of accepting accomplice evidence which is uncorroborated by independent evidence: the question is whether a Judge in Basutoland must apply the rule of English practice as laid down by the Court of Criminal Appeal in *Rex v. Baskerville* [1916] 2 KB 658. In the present case the learned Judge who convicted the appellants the appellants was referred to the cautionary rule which is followed in South Africa and he appears to have been guided by it. That rule has been stated by Schreiner J. in *Rex v. Ncanana* [1948] 4 SALR 399 in the following terms: 'The cautious Court or jury will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What is required is that the trier of fact should warn himself, or, if the trier is a jury, that it should be warned, of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but it such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof aliunde that the crime charged was committed by someone; so that

satisfaction of the requirements of s. 285 (the section in the South African Act corresponding to s. 231 in Basutoland) does not sufficiently protect the accused against the risk of false incrimination by an accomplice. The risk that he may be convicted wrongly although s. 285 has been satisfied will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question.'

Lastly, Lord Reid observed at p. 23:

The cautionary rule is concerned neither with the admissibility of evidence nor with the competency, examination or cross-examination of witnesses, and this section cannot therefore be authority for requiring the adoption of the English cautionary rule. No other legislative provision in force in Basutoland was suggested as containing such authority. **Their Lordships are now satisfied that the South African cautionary rule is properly applicable in Basutoland, and that it was present to the mind of the learned Judge who convicted the appellants and properly applied by him in his case.** The appeal must therefore fail on this ground also. [Emphasis given]

In this case, on appeal to the High Court at Kuala Lumpur, reliance was placed by the learned Judge in the case of *Chiu Nang Hong v. PP* [1965] 31 MLJ 40. That was a case where the appellant was convicted of rape on the basis that the complainant's allegation was corroborated when it was not. The Privy Council allowed the appeal of the appellant holding that there was a miscarriage of justice and that they were justified in intervening. In giving the judgment of the Privy Council Lord Donovan observed at p. 43:

Their Lordships would add that even had this been a case where the learned Judge had in mind the risk of convicting without corroboration, but nevertheless decided to do so because he was convinced of the truth of the complainant's evidence, nevertheless they do not think that the conviction could have been left to stand. For in such a case a Judge, sitting alone, should in their Lordships' view, make it clear that he has the risk in question in his mind, but nevertheless is convinced by the evidence, even though uncorroborated, that the case against the accused is established beyond any reasonable doubt. **No particular form of words is necessary for this purpose; what is necessary is that the Judge's mind upon the matter should be clearly revealed.**
[Emphasis given]

In our judgment, the mind of the trial Judge can only be gathered from the contents of his judgment and nowhere else. To look elsewhere to try to ascertain the Judge's mind would tantamount to taking irrelevant matters into consideration.

Now, after quoting the last sentence of Lord Donovan's dictum at p. 43 which reads:

No particular from of words is necessary for this purpose; what is necessary is that the Judge's mind upon the matter should be clearly revealed.

the learned Judge continued:

I think those were apt words and I am satisfied that the Magistrate had clearly in her mind the warning concerning the risk of accepting the uncorroborated testimony of an accomplice. **This is clearly borne out in the note of the evidence of the case in the Court below.**
[Emphasis given]

If the subjective satisfaction of the trial Magistrate were based on the notes of submission of learned Counsel for the accused and the learned DPP instead of the written judgment, then in our opinion, the learned Judge hearing the appeal had misdirected himself on the law. On the other hand, should there be an ambiguity upon such an important matter it ought, in our view, to be resolved in favour of the accused where the liberty of the subject is involved [see *Chiu Nang Hong* case at p. 43C].

Now, in his judgment the learned Judge did not any reference to the grounds of decision of the trial Magistrate; and if he had done so he would have found that the trial Magistrate had in mind such warning and this was clearly indicated in her judgment. The trial Magistrate said:

> PW1 (Thee Sok Len) and his wife PW2 were accomplices. They knew that the sale and purchase of the baby was an offence under the law. Because they were accomplices the Court may presume under s. 114, illustration (b), of the Evidence Act 1950 that their evidence is unworthy of credit unless they are corroborated in material particulars. The evidence of PW1 cannot be corroborated by the evidence of his wife PW2 because PW2 was also an accomplice.

Then the trial Magistrate referred to the following provisions of s. 133 of the Evidence Act:

> An accomplice shall be a competent witness against an accused person;and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

After alluding to a passage in *Sarkar's Law of Evidence* dealing with the subject of evidence of an accomplice and corroboration, the trial Magistrate stated that she accepted the evidence of PW1 and PW2, and she gave the reason for doing so as follows:

> There is no reason for them (i.e. PW1 and PW2) to tell lies in Court. On the other hand if they tell the truth they themselves stand to lose because they would be ordered to return the baby.

The warning as to the danger of convicting on uncorroborated evidence if the prosecution is relying on the testimony of an accomplice does not involve some legalistic ritual to be automatically recited by the trial Magistrate, or that some particular form of words or incantation has to be used and if not used, the judgment is deemed to be faulty and the conviction set aside. There is no magic formula and no set words which must be adopted to express the warning. Rather must the good sense of the matter be expounded with clarity and in the setting of a particular case [see the judgment of Lord Ackner in *R v. Spencer* [1986] 2 All ER 928 @ 937B]. Although the answer to the certified question is that the High Court was wrong in law to hold the warning need not appear in the judgment or grounds of decision of the trial Magistrate, however, having regard to what we have stated above, we agree with the learned Judge that the appeal be dismissed and the conviction be affirmed.

Also found at [1987] 1 CLJ 358